Supreme Court, U.S.
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80-843

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CARIBE TRAILER SYSTEMS, INC. and JOHN R. IMMER,

Petitioners,

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether Puerto Rico Public Law No. 62 (1974) is immune from the Sherman Antitrust Act under *Parker v. Brown* so as to permit it to maintain a monopoly beyond its territorial boundaries.

2. Whether Puerto Rico Public Law No. 62 (1974) exceeds the authority granted to the legislature by Congress.

3. Whether Puerto Rico Public Law No. 62 (1974) violates the Commerce Clause of the Constitution.

4. Whether a State or Territory retains its sovereign immunity or any immunity beyond its boundaries.

5. Whether a lower court decision declaring Puerto Rico to be a "state" when such decision is in direct contradiction to a recent decision of the Supreme Court should be allowed to stand.

6. Whether a state or territorial government retains immunity from federal laws when it engages in a commercial shipping operation.

7. Whether corporations owned by the Government of Puerto Rico (PRMSA and PRPA) but not arms of that government can maintain the sovereign immunity of the Commonwealth of Puerto Rico from federal law.

8. Whether Petitioners have had proper appellate review and whether there have been irregularities in procedure where an appellate judge, who was involved in the case before appointment to the bench, refused to recuse herself and where the appellate court refused to write an independent opinion even though, *sua sponte*, it brought the Attorney General into a private lawsuit.

9. Whether the conspirators can escape the venue of the forum district when a substantial part of the work of the conspiracy and monopoly was performed within that district.

10. Whether the lower courts can ignore the mandate of 28 U.S.C. §1391(b) and refuse to allow venue at the place of injury.

11. Whether the trial court can disturb the forum selected by plaintiffs pursuant to federal statute where substantial acts occurred within the forum district.

12. Whether the trial court can ignore the "Long Arm" provision of the District of Columbia Code §13-423, which holds Respondents for venue.

13. Whether a decision of the lower court, which is unsupported by case law and in conflict with decisions within its own circuit and with decisions of other circuits as well as the Supreme Court, should be allowed to stand as a precedent when it abruptly violates far-reaching constitutional guarantees and vitally affects the entire Puerto Rican economy as well as all American shipping.

LISTING OF PARTIES

Respondents in this case are:

Puerto Rico Maritime Shipping Authority ("PRMSA"),

Puerto Rico Ports Authority ("PRPA"),

R.J. Reynolds Industries, Inc. ("Reynolds"),

McLean Industries, Inc. ("McLean"),

Sea-Land Service, Inc. ("Sea-Land"),

T.K.M. Corporation ("TKM"),

Gulf Puerto Rico Lines, Inc. ("GPRL"),

Sun Shipbuilding and Dry Dock Co. ("Sun Ship"),

Transamerican Trailer Transport, Inc. ("TTT"),

American Union Transport, Inc. ("AUT"), and

Trans Ocean Transportation Executive Management, Inc. ("TOTEM").

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTION

This case was originally brought before the Federal Court of the District of Columbia on March 13, 1978 under the Sherman Antitrust Act, 15 U.S.C. §§1-3 and under Section 4 of the Clayton Act, 15 U.S.C. §15. No discovery or evidentiary proceedings were allowed by the trial court which entered a summary judgment in favor of defendants on April 23, 1979.

The *per curiam* order of the United States Court of Appeals, District of Columbia Circuit, supporting the lower court decision and dismissing the case, was issued

on July 3, 1980 with no opinion or memorandum. Petitioners' Application for Rehearing, or in the Alternative Rehearing *En Banc* was denied on August 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition was filed within ninety days of the order of the District of Columbia Circuit denying a rehearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Sherman Antitrust Act, Section 1, 15 U.S.C. §1.

§1. Trusts, etc. in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

- as amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, 2, 89 Stat. 801.

2. Sherman Antitrust Act, Section 2, 15 U.S.C. §2.

§2. Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof,

shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

- as amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708.

3. Sherman Antitrust Act, Section 3, 15 U.S.C. § 3.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony.

Every contract, combination in form of a trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

- As amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708.

4. Commerce Clause of the Constitution, Article 1, Section 8, Clause 3.

To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;

5. The Constitution, Congressional Authority, Article 4, Section 3, Clause 1.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

6. 2nd Puerto Rico Organic Act, 48 U.S.C. §821.

The legislative authority shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend or modify any and all laws and ordinances of every character in force in Puerto Rico or municipality or district thereof on March 2, 1917 c. 145 37, 39 Stat. 964; May 17, 1932, c. 190, 47 Stat. 158.

7. Clayton Act of 1910, §4, 15 U.S.C. §15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

8. Clayton Act of 1910, §12, 15 U.S.C. §22.

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in

any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

9. General Federal Venue Provision, 28 U.S.C. §1391.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose. (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law. (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residene of such corporation for venur purposes.

10. D.C. "Long Arm" Provision, D.C. Code, §13-423.

§13-423. Personal jurisdiction based upon conduct

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's –

(1) transacting any business in the District of Columbia;

(2) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

STATEMENT OF THE CASE

In Brief Outline the Undisputed Facts are as Follows:

1. A special Commission to study shipping to Puerto Rico was set up by the Puerto Rican Senate on March 8, 1973. Shortly after that Mr. Teodoro Moscoso, a director of PRPA and later a director of PRMSA, hired Mr. Francis Kesterman, a shipping consultant in Washington, D.C., to evaluate shipping proposals. He was assisted in this selection by Mr. Mario Escudero, an attorney for PRPA and later PRMSA, whose offices are located in Washington, D.C. By December of 1973 the Governor decided to create a shipping monopoly which would control all shipping to and from Puerto Rico. This decision was kept secret and not revealed to the public until after March, 1974.

2. On June 10, 1974, the Puerto Rico legislature passed Public Law 62 which authorized the formation of PRMSA to exclusively operate shipping services to and from the island as a commercial operation, domestic and foreign. Most of these operations were to be outside the territorial limits of the island and were to involve interstate commerce. During October, 1974, PRMSA acquired the Puerto Rican services and equipment of Sea-Land, Seatrain and TTT, comprising approximately 90% of all the liner capacity of the Puerto Rico-mainland trade, and has since operated these services as a shipping monopoly. The new service of PRMSA eliminated all direct liner service and restrained the trade to the ports of Boston, Philadelphia and Mobile which ports still in 1980 have no direct liner service.

3. On January 4, 1973, Petitioners filed an application before the U.S. Maritime Administration (Marad) for a mortgage loan guarantee for a 500-unit trailer ship to be

used on a service to Puerto Rico. The application was processed at first with complete cooperation of Marad officials but sometime in April or May of 1973 the climate changed to that of an adversary action and thereafter Petitioners were beset with numerous conflicts and demands. Finally, on March 13, 1974, Petitioners were told by Marad that the application was denied.

4. Petitioners claim that a major reason for this denial was the knowledge of Marad of the planned shipping monopoly and that it has since been unable to raise capital because of the existence of a government-owned shipping monopoly on this service.

5. On February 11 and 12, 1974, various representatives of the Puerto Rico government, including Mr. Moscoso, met with representatives of Sea-Land, Seatrain and TTT to discuss plans for a conspiracy by which the Puerto Rican government would acquire these services and operate them as a single unit with a management company to be supplied by Sea-Land. It was noted that Marad was aware of the proposal. Mr. Escudero was to take action to forestall any legal threat to the monopoly (Appendix D, p. 40a). At this meeting and in later negotiations Mr. Malcolm McLean represented and acted for Sea-Land, McLean Industries, Inc. and R.J. Reynolds Industries, Inc. Later, other Respondents became involved through agreements and other actions taken in regard to the conspiracy and the acquisition of the Puerto Rico services of the three private shipping lines.

6. Thereafter, various memoranda of agreement, contracts for sale and transfer of equipment and facilities and management contracts were prepared (most of this work being done in offices within the District of Columbia).

These documents were signed in New York City, Philadelphia, the Bahamas, San Juan and other places. Most of Mr. Kesterman's work directed by Mr. Moscoso in 1973 and 1974 was done within the District of Columbia where he lived and had his office. See Appendix E, p. 43a.

7. Respondents admit to the facts presented by Petitioners and admit to the conspiracy and to the setting up and operation of a shipping monopoly. The standing of Petitioners to sue has not been challenged. The damage to Petitioners has not been contested. The only defense of Respondents is the alleged immunity of the Puerto Rico legislature from antitrust laws in extraterritorial actions and the immunity of PRMSA and PRPA and the others who rely on that immunity. Venue has been challenged for McLean, Reynolds and GPRL and the choice of forum selected by Petitioners for these parties has been rejected. Petitioners have had no discovery or evidentiary proceedings in the case but were forced to rely on the pleadings including certain documents and testimony obtained in an earlier action before the Federal Maritime Commission.

REASONS FOR GRANTING THE WRIT

The issue here is a one-judge decision of a lower court which says that Puerto Rico is a state, is immune from the Sherman Antitrust Act and has the power to establish a shipping monopoly and engage in commercial activities beyond its territorial limits and to restrain and control trade between Puerto Rico and the states and foreign countries. Both the lower court and the appellate court ignored pleas of Petitioners that the Commerce Clause of the Constitution applied and that the Puerto Rican legislature did not have the authority to pass legislation in

interstate commerce or to restrain trade with the states on the mainland.

The decision rests upon legal points unsupported by case law and is in direct conflict with previous decisions within the circuit, decisions of other circuits and with decisions of the Supreme Court.

Petitioners were denied the benefits of appellate review. The three-judge panel included a recently appointed judge who was formerly an Assistant Attorney General of the United States who had participated in the pre-trial efforts below. Thereafter, the appellate court felt this case of sufficient importance to solicit, *sua sponte,* an *amicus curiae* brief from the United States. The Attorney General (not the Solicitor General as required by 28 C.F.R. §0.40) obliged by submitting a brief supporting Respondents' position and containing, *inter alia,* fifty-five pages of entirely new material after oral argument, which material was obtained only in collusion with Respondents. This *amicus curiae* brief was delayed nearly two months until this new material could be supplied. Despite all this, the appellate court refused to write an opinion on these important matters but simply gave a ten-line *per curiam* decision sustaining the trial court.

The decision being appealed from says that state and territorial governments have immunity from the Sherman Antitrust Act and presumably from other federal laws when they set up monopolistic commercial operations.

Specifically, it says that the entire ocean-borne trade from the mainland to Puerto Rico shall be carried by a government owned monopoly to the exclusion of private enterprise. As the government acting through PRPA controls all the port facilities of the island it can and has pre-

vented competition in this service. Puerto Rico is the largest off-shore maritime customer of the United States mainland. The Maritime Administration projected in 1973 that the total cargo on the U.S./Puerto Rico trade would reach 16 million tons in 1980 and 28 million tons in 1990. Outgoing shipments to Puerto Rico from the U.S. alone amounted to $4.3 billion in 1979 for nearly six million short tons. The impact of efficient shipping on the economy of Puerto Rico must be measured in billions of dollars and thousands of jobs for the islands. These jobs depend on efficient and dependable ocean transport.

The decision below would permit any state to set up its own shipping or transport monopoly. As most of the states already control their ports the decision below can be expected to lead to the formation of state-owned trucking, railroad or even airline companies in order to siphon more trade into their own ports. Such control over transport by the state will bring back all the evils of monopoly power to transport.

I.
EXTRATERRITORIAL IMMUNITY Of STATE GOVERNMENTS UNDER PARKER v. BROWN INVADES COMMERCIAL AREA.

That a state or territorial government can set up a shipping monopoly beyond its boundaries and enter interstate and foreign trade to the detriment of other states is contrary to the American system and up to now has never been sustained by the courts or the law.

The decision of the lower court that PRMSA and PRPA "are exempt from antitrust liability under the *Parker* doctrine" is not supported by *Parker* and, in fact, is specifically excluded from such support by the wording

of the decision. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, (issued in 1943) was very mindful of *Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934) which said at page 369: "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader." This statement was also cited as controlling in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 696 (1976). *Parker v. Brown, supra*, at p. 352 specifically rejected any question of involvement of the state with private interests or the operation by the state of any activity which restrained trade. That *Parker* specifically excluded immunity for a commercial operation of the state was cited by Chief Justice Burger in his dissenting opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) where he referred to "a sovereign's decision - as in *Parker* - to replace competition with regulation."

Respondents and the courts below base their entire defense on a misconstrual of *Parker v. Brown, supra*, as permitting a state government to displace competition and set up a monopoly of its own commercial activities including "extraterritorial coverage" involving interstate commerce.

This is a misstatement of what *Parker* said. *Parker* said that the Sherman Act was not intended to apply to a state where no instrumentality of the state was involved in a monopolistic action, where there was no element of interstate commerce and where there was not the slightest suspicion that there was any violation of the Commerce Clause of the Constitution. One half of the entire decision was taken up with this last point.

The normal assignment of sovereignty matters within the state of California as delineated in *Parker* was distorted and misconstrued by the lower court decision in order to support the creation of a Commonwealth-owned shipping monopoly which has restrained trade with the U.S. mainland. This is the very type of rapacious action of one state by another which the Commerce Clause was designed to prevent. That the immunity of a state or territory extends beyond its territorial boundaries even when engaged in a shipping monopoly which restrains interstate commerce between certain ports is a novel and unique concept offered without any case support and in direct conflict with a solid array of Supreme Court decisions. Such a decision should be reviewed by this Court.

II.
THE LOWER COURT PRESUMES TO GRANT POWERS TO THE PUERTO RICO LEGISLATURE WHICH HAVE NOT BEEN GRANTED TO IT BY CONGRESS.

The decision of the lower court grants to the Puerto Rico legislature the power to legislate in other than local matters and to legislate in interstate commerce and to interfere with trade between the states. These things are beyond the powers granted by Congress to the legislature of Puerto Rico and constitute a usurpation by the court of powers reserved by the Constitution to Congress.

The Legislature of Puerto Rico has the authority only to pass those laws authorized by Congress in the 2nd Organic Act of 1950, specifically as set forth in 48 U.S.C. §821. *Caceres v. San Juan Barge Co.*, 387 F.Supp. 221 (D.C.P.R. 1974), aff'd. 520 F.2d 305. The authority is limited to the territorial boundaries of the island and its adjacent waters. *Huckins v. Board of Regents, supra.* That the territorial limits of the island were the limits of power of the Puerto Rican legislature was stated by the

2nd Circuit in *Williams v. McAllister Bros. Inc.*, 534 F.2d 19 (1976). Even within Puerto Rico the courts have maintained that Puerto Rico is not authorized to supplant maritime law. *Santiago v. Hermanos*, 255 F.Supp. 932 (D.C.P.R. 1966).

The lower court decision would grant to Puerto Rico greater powers than those enjoyed by any state in the Union. It is in direct conflict with the decisions of other circuits as well as the powers granted to the legislature of Puerto Rico which only Congress can grant.

III.
CONTROL OF INTERSTATE COMMERCE AND RESTRAINT OF TRADE BY A STATE VIOLATES THE COMMERCE CLAUSE.

When a state or territory invades the area of interstate commerce or restrains trade it violates the inherent rights of other states to engage freely in interstate commerce as guaranteed by the Commerce Clause of the Constitution. In *Reeves, Inc. v. Stake*, ___ U.S. ___, 100 S.Ct. ___, 65 L.Ed.2d 244, 252 (1980), the Court said:

> "We granted Reeves' petition for certiorari to consider once again the impact of the Commerce Clause on state proprietary activity."

The same issue and the same danger is involved here. *Reeves v. Kelly*, 99 S.Ct. 2155, was remanded on the basis of *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) where the Court at 99 S.Ct. 1731 pointed out the danger of any "Balkanization" of the Union.

Puerto Rico Public Law No. 62 (1974) established a Puerto Rican government-owned shipping company to handle trade exclusively between Puerto Rico and the other states. The first thing done was to eliminate direct service for liner cargo to Boston, Philadelphia and Mobile.

It then reduced the container capacity on the other routes. By collusion of PRPA and PRMSA Seatrain was prevented from re-entering the Puerto Rico trade in 1976. *PRPA v. F.M.C.*, C.A.D.C. No. 78-1950, June 10, 1980, ___ U.S. App. D.C. ___, ___ F.2d ___.

Parker said specifically that a state could violate the Sherman Act if it became "a participant in a private agreement or combination by others in the restraint of trade." 317 U.S. at 352. The acts of the respondents of this case constitute such a violation, regardless of whether or not PRMSA and PRPA are "arms of the government" or mere instrumentalities without immunity.

Parker v. Brown itself said that states remained under the stricture of the Commerce Clause and emphasized that the State of California had acted in a matter which did not involve interstate commerce and was not violative in any way of the Commerce Clause of the Constitution. Petitioners properly raised the issue before the lower court but were ignored. The issue was also ignored by the appellate court. Does the Commerce Clause permit the operation of a state-owned monopoly in interstate commerce in violation of federal law? Now only the Supreme Court can prevent that.

IV.
EXTENSION OF IMMUNITY BEYOND THE BOUNDARIES OF A STATE IS IN CONFLICT WITH COURT DECISIONS.

The decision of the lower court brushes off any limitation to the sovereign immunity of a state simply because the action and operation is "extraterritorial." Petitioners aver that the lower court decision is directly in opposition to *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, affirming a California decision (141 Cal. R. 441

(1977)) which said that "state sovereignty ends at the state boundary." Puerto Rico has no sovereignty and no immunity from any federal law beyond its territorial limits.

V.

THE RULING OF THE COURT BELOW THAT PUERTO RICO IS A STATE IS CONTRARY TO RULINGS OF THE SUPREME COURT.

Much legal confusion will result from the decision which says that Puerto Rico is a state. The decision of the lower court says that Puerto Rico is a state "for purposes of applying the *Parker* doctrine." The only case cited in support of this new concept was *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 351 F.Supp. 1153, 1229 (D. Hawaii 1972), mod. on other grounds, 518 F.2d 913 (9th Cir. 1975), which said only that "It is properly inferrable . . . that the Commonwealth of Puerto Rico is entitled to as much respect for its soversignty as was the state of California in *Parker v. Brown.*" In order to clarify this statement the ITT Court said further at p. 1230: "There is no question that, as a general proposition, the federal antitrust laws are applicable in Puerto Rico. . ."

In any case, the Supreme Court ruled on May 27, 1980, that Puerto Rico is a territory and that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris v. Rosario*, No. 79-1294, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___. Therefore, the decision of the lower court, based as it is on the ruling that Puerto Rico is a state, should be struck down.

VI.
THE COURT HAS CONSISTENTLY REJECTED IMMUNITY FROM FEDERAL LAW WHEN A STATE ENGAGES IN COMMERCE.

The lower court was clearly wrong when it granted immunity to a territorial government in a strictly commercial operation. The decision cannot stand in the face of *Ohio v. Helvering, supra.*, which was restated in 1976 in *Alfred Dunhill of London v. Cuba, supra.* To permit a monopoly of the Commonwealth government in a commercial shipping enterprise is not only a serious blow to American shipping but could be the genesis of the Balkanization of the States of the Union.

Even where a recognized instrumentality of the state, ordinarily retaining the immunity of the state, engages in interstate commerce or navigable waters, it loses its immunity from federal law. *Huckins v. Board of Regents,* 263 F.Supp. 622, 623 (Mich. 1967) which relied on *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). In *Cocherl v. State of Alaska,* 246 F.Supp. 328 (D. Alaska 1965) the operation by the State of Alaska of a vessel as a common carrier in interstate commerce on navigable waters of the United States was ruled to constitute a waiver of its sovereign immunity and to subject it to federal laws. This decision was controlled by *Parden, supra* and *Petty v. Tenn.-Mo. Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1958).

How can a lower court decision be allowed to stand without any case support whatsoever in such blatant conflict with decisions from other circuits, all of which are based upon decisions of the Supreme Court?

VII.
THAT PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO PORTS AUTHORITY HAVE IMMUNITY IS CONTRARY TO ALL CASE LAW.

The lower court decision says that the Puerto Rico Maritime Shipping Authority (PRMSA) and the Puerto Rico Ports Authority (PRPA) are agencies of the Commonwealth of Puerto Rico and are not subject to antitrust laws. Such an opinion is not supported by any case law and is contrary to what all previous decisions, most of them in federal courts in Puerto Rico, have said. The decision is contrary to the criteria set forth in *Cancel v. San Juan Construction Co.*, 387 F.Supp. 916 (D.P.R. 1974). These two government-owned corporations have their own sources of income from fees and rates charged for services and the Puerto Rican government is properly insulated from their losses.

Federal courts of Puerto Rico and the 2nd Circuit have ruled that PRPA is a public corporation, is subject to suit and federal laws and has no sovereign immunity. *Can. Transport Co. v. PRPA*, 333 F.Supp. 1295 (D.C.P.R. 1971); *Krisel v. Duran*, 258 F.Supp. 845, 853 (S.D.N.Y. 1966); *PRMMI v. Int'l L. Ass'n., AFL-CIO*, 398 F.Supp. 118 (D.C.P.R. 1975). In the 2nd Circuit, the Court ruled in *Star Lines, Ltd. v. PRMSA*, 442 F.Supp. 1201, 1207 (S.D.N.Y. 1978) that PRMSA is subject to an antitrust suit in the State of New York. Later, in a confirming action in the same matter, *Star Lines, Ltd. v. PRMSA*, 451 F.Supp. 157 (S.D.N.Y. 1978) said that PRMSA has no immunity from liability under the federal antitrust laws.

Other case law should be respected and the decision should be reversed to bring it into line with the other decisions. Assuming, arguendo, that the Puerto Rico

legislature had the power to impose a shipping monopoly on other states, the instruments used for this purpose would have to have immunity, otherwise the immunity of the sovereign could not be claimed. The government of Puerto Rico is not a party to this suit. Immunity is claimed through two government-owned corporations whose immunity has already been denied in all cases where this has been considered.

VIII.
SERIOUS DEPARTURES FROM THE USUAL COURSE OF PROCEEDINGS IN THE FEDERAL COURTS REQUIRE THE ATTENTION OF THE SUPREME COURT.

Petitioners aver that there have been improper influences of the Department of Justice exerted on this case in the lower court and in the Court of Appeals which have prevented an objective application of the law and court decisions to the issues of this case.

Petitioners are prepared to show in brief that there has been a cohesion of interest between the Respondents and the Department of Justice with a consistent pattern of support for this monopoly since 1974 over and beyond the limits permitted by the Code of Federal Regulations.

Petitioners can show that the judge in the lower court gave serious weight in his decision (at p. 4) to the fact that "the Antitrust Division granted favorable clearance on July 22, 1974." Having thus been assured that approval had been given to the project by the United States government even though it was identified as giving "PRMSA control over ninety percent of the then-existing ocean shipping services," the judge then proceeded to jusitify this decision by assertions which were not supported by any case law and, in fact, were violative or contradictory of all court decisions pertinent to this area.

The error of the judge was compounded by the fact that the Business Review Letter on which he relied was issued to the Commonwealth of Puerto Rico which, according to 28 C.F.R. 50.6, ¶4, cannot apply to any party not on the original application. The Commonwealth government is not a party to this suit. Therefore, there is no legal basis for basing the lower court decision on this Letter which does not apply to any of the respondents of this case. Petitioners are justified in asking for a reversal of the entire decision on this one point alone.

Petitioners can show that a judge of their appellate panel was an immediate past Assistant Attorney General and in that capacity had been involved with a previous complaint of Petitioners and did not recuse herself from the case. That complaint was directed against the U.S. Maritime Administration which is under the Secretary of Commerce who was at that time a director of one of the Respondents. Shortly after her appointment to the panel the Court issued, *sua sponte,* an order bringing in the United States Government as an *amicus curiae.* The Attorney General, not the Solicitor General as required by 28 C.F.R. §0.40, did not defend federal law but presented legal conclusions diametrically opposed to earlier briefs of the Solicitor General, i.e. the Attorney General maintained that Puerto Rico is a territory. See Solicitor General's brief in *Harris v. Rosario, supra.* Two days after the filing of a reply by Petitioners the Court issued a per curiam decision with no opinion and no memorandum.

Where constitutional issues have been raised and there is such a conflict with previous court decisions the per curiam decision becomes a mechanism which permits the Court to conceal any departure from the usual course

of proceedings and Petitioners submit that there have been such departures.

IX.
COURT DECISIONS SUPPORTING CONSPIRACY THEORY WERE IGNORED AND DISREGARDED.

The lower court decision ignored and rejected the established rule of its own circuit that all members of a conspiracy are bound for venue where a substantial part of the work of the conspiracy took place within the forum district. *Mandelkorn v. Patrick,* 359 F.Supp. 692 (D.C. 1973) and *Berlin Demo. Club v. Rumsfeld,* 410 F.Supp. 144 (D.C.D.C. 1976).

Since then, this conspiracy theory has become the accepted rule for venue in other circuits. See *California Clippers, Inc. v. U.S.S.F. Associates,* 314 F.Supp. 1057, 1067. In the 4th Circuit the Court said: "When individuals join in a conspiracy the acts of one conspirator are attributable to each co-conspirator." *McLaughlin v. Copeland,* 435 F.Supp. 513 (D. Md. 1977). See also *Gemini Enterprises, Inc. v. WFMY, Tel. Corp.,* 470 F.Supp. 559, 564 (M.D.N.C. 1979).

Ladner v. U.S., 168 F.2d 771 (5th Cir. 1948) stated that "venue in the prosecution may be laid in any district in which any act in furtherance thereof was committed by any of the conspirators," and relied on *Hyde v. U.S.,* 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). *U.S. v. Snead,* 527 F.2d 590 (1975) of the 4th Circuit also said the same thing and also relied on *Hyde, supra.*

Where a not insubstantial part of the work of the conspiracy was performed in the forum district the decision not to grant venue on this basis was without support of

other cases and contrary to case law as observed in this and other circuits.

X.

PETITIONERS WERE DENIED BENEFIT OF SECTION 1391(b) IN ESTABLISHING VENUE WHERE CLAIM AROSE.

The lower court decision cites *Redmond v. Atlantic Coast Football League,* 359 F.Supp. 666, 672, S.D. Ind., aff'd. mem., 478 F.2d 1405 (7th Cir. 1973) but ignores the part of *Redmond, supra,* at p. 672 which says that venue will lie in any district where there are overt acts constituting a significant and substantial element of the offenses charged.

The lower court decision is contrary to the provisions of Section 1391(b) which allow venue in the district where the claim arose.

XI.

PETITIONERS WERE DENIED THEIR CHOICE OF FORUM DISTRICT IN A DIVERSITY CASE.

The lower court decision denies venue for Reynolds, McLean and GPRL, admits unquestioned venue for Sea-Land and leaves the question of venue for the others undisturbed. This is the sort of situation which Section 1391(b) sought to prevent.

This rule on venue in the District of Columbia Circuit was set by *Lamont v. Haig,* 192 U.S. App. D.C. 8, 590 F.2d 1124, 1134 (D.C. Cir. 1978) which assured the existence of at least one forum where multiparty litigation was involved. The decision (App. A, p. 16a) admitted that some acts and contacts took place within the forum district and said only that state action exemption would preclude liability for the other defendants.

This denial of venue was contrary to the two court decisions in *Star Lines, Ltd. v. PRMSA, supra.* In those decisions the court refused to disturb the forum selected by the plaintiff. The matter of venue is not a discretionary decision of the trial court but is based on federal statutes and substantive law.

That the lower court's decision is a legal aberration and should be eradicated is shown by the later decision of *Thornwell v. U.S.*, 471 F.Supp. 344 (1979) in the District of Columbia Circuit which upheld venue in similar circumstances. Where events having "operative significance in the case" occur within the forum district venue will be allowed. *Thornwell, supra,* also relied on *Conley v. Gibson,* 355 U.S. 41-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This view has also been supported in *Allis-Chalmers Corp. v. Friedkin,* 481 F.Supp. 1256, 1265 f.n. (M.D. Pa. 1980); *Gold Eagle Co. v. Li,* 486 F.Supp. 201 (N.D. Ill. 1980); and *Florida Nursing Home Ass'n. v. Page,* 616 F.2d 1355 (5th Cir. 1980).

That the forum district selected by plaintiffs should not be disturbed was stated in *Lamont v. Haig, supra,* by Chief Judge Bazelon who was also one of the three judges on Petitioners' Appellate Panel. It is thus all the more inexplicable why the appellate court would reverse itself on a major issue by indirection in refusing to render a written opinion either vindicating or supporting its previous decision in *Lamont.*

XII.
PETITIONERS WERE DENIED BENEFIT OF "LONG ARM" PROVISIONS OF DISTRICT OF COLUMBIA CODE §13-423 AS HOLDING RESPONDENTS FOR VENUE.

The lower court decision denies venue for Reynolds, McLean and GPRL on the basis that no control is shown over Sea-Land (where venue is unquestioned), says that

overt action within the forum district was not shown and denied that this district was the place of injury for plaintiffs. To reach this decision the Court had to reject the allegations of plaintiffs before any discovery had been allowed which denied plaintiffs the safeguards in this respect assured to them by *Conley v. Gibson, supra.*

The decision also conflicted with *American Mail Lines, Ltd. v. F.M.C.*, 164 U.S. App. D.C. 66, 503 F.2d 157, 166 (C.A.D.C. 1974), *cert. den.* 419 U.S. 1070, which said that R.J. Reynolds "possessed . . . extensive power to control USL and Sea-Land . . .". Tortious injury was caused Petitioners by Reynolds and McLean both by Sea-Land as agents and directly by Mr. Malcolm McLean in his direction of the work of the conspiracy done in Washington, D.C., i.e., the preparation of the agreements and legal documents. The injury caused by the rejection of their loan application by the Maritime Administration also occurred within the District of Columbia thus establishing venue for all Respondents under § 13-423.

CONCLUSION

The issues of this case are far more important than the case itself. Is there no legal protection against a state or territorial government that decides to monopolize transport between it and other states on a unilateral basis and deprive those states of direct ocean services? Does the Commerce Clause of the Constitution protect other states from such rapacious acts? Can a state government operate in commerce completely immune to federal law? Does Puerto Rico have powers to legislate other than those granted by Congress under the Constitution?

Specifically it is the people of the Commonwealth of Puerto Rico who need protection from the evils of a monopolistic shipping operation which needs $500 million worth of new ships to be provided by the public debt of the Commonwealth. No private shipping company can enter the service in competition with the government and thus provide the capital for these ships that is needed. Thus, one of the United States' largest offshore customers is denied the benefits of private shipping and new enterprise. The impact on the Puerto Rico economy is obvious.

Petitioners have been denied access to the Puerto Rico trade since 1973. Failure to reverse this decision will permanently stop Petitioners – and all other potential competitors – from entering the service. It will be another blow to efforts to strengthen private shipping in the face of local governmental policy to invade the commercial area.

The effects will not be limited to shipping alone. Perhaps the greatest immediate danger of this decision will be to truck lines, railroads and even air lines as these areas offer the greatest temptation especially to the states already having state-controlled port areas.

Because of the critical importance of the constitutional issues involved, to say nothing of the multi-billion dollar transportation industry which is so vitally affected, the decision of the court below should not be allowed to stand.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that summary reversal should issue.

Respectfully submitted,

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November 25, 1980

APPENDIX

APPENDIX A

ORDER AND MEMORANDUM OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1435

CARIBE TRAILER SYSTEMS, INC.
and JOHN R. IMMER,

Plaintiffs,

v.

PUERTO RICO MARITIME SHIPPING
AUTHORITY, et al.,

Defendants.

ORDER

Upon consideration of defendant's motion to dismiss and for summary judgment, the memorandum in support thereof, the opposition thereto, the arguments of counsel, and the entire record in this case, it is by the Court this 19th day of April, 1979,

ORDERED that the motion of defendants R. J. Reynolds Industries, Inc., McLean Industries, Inc., and G Gulf-Puerto Rico Lines, Inc., to dismiss the complaint for lack of subject matter jurisdiction be, and hereby, is granted; and it is further

ORDERED that the motions of defendants Puerto Rico Maritime Shipping Authority, Puerto Rico Ports Authority, Transamerica Trailer Transport, Inc., Puerto Rico Marine Managaement, Inc., T.K.M. Corporation,

Sea-Land Services, Inc., American Union Transport, Inc., Trans Ocean Transportation Executive Management, Inc., and Sun Shipbuilding & Dry Dock Co. for summary judgment be and hereby are granted.

/s/ Oliver Gasch
Judge

MEMORANDUM

This is an action to recover treble damages for alleged violations of sections 1, 2, and 3, of the Sherman Antitrust Act.[1] The basis of the complaint is an alleged conspiracy by twelve private and governmental entities to create a monopoly in ocean transportation between the East Coast and Gulf ports of the United States and the ports of Puerto Rico. Presently before the Court are the motions of ten defendants to dismiss the complaint on grounds of improper venue and lack of personal jurisdiction, and the motions of nine defendants for summary judgment on the ground that their conduct is immunized from antitrust liability under the state action doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943). For For the reasons discussed below, the Court concludes that defendants' motions should be granted.

FACTUAL BACKGROUND

Plaintiff Caribe Trailer Systems, Inc., ("Caribe") is a Puerto Rico corporation with its principal place of business in Washington, D.C. John R. Immer is the principal owner and chairman of the board of Caribe. Caribe was organized for the purpose of engaging in ocean transportation between East Coast and Gulf ports of the continental United States and the ports of Puerto Rico, but its activities never became operational. Plaintiffs contend that because of defendant's alleged antitrust violations, plaintiffs were unable to obtain financing to commence their operations and therefore were prevented from competing in the Puerto Rico trade. They seek a

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[1] 15 U.S.C. §§ 1-3 (1976).

permanent injunction against defendants' activities as well as treble damages, costs, and attorneys fees.

Each defendant named in this lawsuit had some involvement in the creation or operation of the Puerto Rico Maritime Shipping Authority ("PRMSA"), a government agency organized by the Commonwealth of Puerto Rico in 1974 to operate Puerto Rico's maritime transportation system. Because of its small size, insular postion, and limited natural resources, Puerto Rico has difficulty in maintaining a self-sufficient economy and is dependent on external trade for economic and social development. Ocean transportation carries more than ninety-eight percent of its external trade and as a result, ocean freight costs exert a potentially disruptive influence over all aspects of Puerto Rico's economy. Trade between East Coast and Gulf ports represents the major avenue of traffic between Puerto Rico and the mainland United States and accounts for approximately eighty-five percent of all dry cargo transported and over seventy percent of Puerto Rico's total external trade.

Because of the island's dependence on ocean transport, the Governor of Puerto Rico in 1973 established a commission to determine whether the Commonwealth should take steps to acquire the vessels then employed by commercial steamship companies in the Puerto Rico trade. This acquisition was intended to assure the availibility of vessels and to maintain price stability with respect ot transportation costs. Following negotiations with the three major carriers, the commission proposed legislation that would establish a nonstock public corporation to own or lease the vessels and equipment necessary to conduct the Mainland-Puerto Rico tade. On June 10, 1974, the Commonwealth legislation enacted this proposal as Act 62 and created the Puerto Rico Maritime

Shipping Authority as a governmental instrumentality to operate Puerto Rico's maritime transportation system.[2]

PRMSA, which is incorporated in Puerto Rico, consists of a governing board of seven members, all of whom are residents of Puerto Rico, appointed by the Governor with the advice and consent of the Puerto Rico Senate. Its operations are exempt from taxation and from all fees required for the prosecution of judicial proceedings. The Statement of Motives contained in Act 62 expresses the intent of the Puerto Rico legislature that PRMSA acquire and operate shipping lines and terminal facilities as a public service, and, in doing so, that it not be subject to the antitrust laws or any other limitations that would hinder its legislative goal.[3]

Following its organization, PRMSA acquired the rights to eleven ships and to various maritime transportation facilities from the three major carriers that served the Puerto Rico trade: Seatrain, Inc.,[4] and defendants Sea-Land Service, Inc. ("Sea-Land"), and Transamerican Trailer Transport, Inc. ("TTT"). The acquisition of these assets occurred in the following manner. Defendant American Union Transport, Inc., ("AUT"), a 63.3% shareholder in TTT, and defendant Sun Shipbuilding & Dry Dock Co. ("Sun Ship"), a 30% shareholder, directly conveyed their interests in TTT to PRMSA. TTT has since become a dormant corporation because PRMSA

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[2]Act of Puerto Rico Maritime Shipping Authority, Act No. 62 (June 10, 1974), *see* Exh. A in Appendix to Puerto Rico Defendants' Motion to Dismiss the Complaint.

[3]*Id. See also* Affidavit of Roberto Jugo D'Acosta in support of Puerto Rico Defendants' Motion to Dismiss the Complaint, at ¶2.

[4]Seatrain is not named as a defendant to this action.

operates its assets under PRMSA's own name and its officers and directors are the same as PRMSA's.

The vessels owned by Sea-Land were transferred through a similar transaction. Sea-Land and Gulf-Puerto Rico Lines ("GPRL") are both wholly owned subsidiaries of defendant McLean Industries, Inc. ("McLean"). McLean is a holding company which in turn is wholly owned by defendant R.J. Reynolds Industries ("Reynolds"). McLean and Reynolds conveyed their interests in Sea-Land to PRMSA.

Before these transfers were effected, the Commonwealth of Puerto Rico sought a business review letter from the Antitrust Division of the Department of Justice with respect to PRMSA and the proposed acquisition.[5] Although the acquisition would give PRMSA control over ninety percent of then-existing ocean shipping services, the Antitrust Division granted favorable clearance on July 22, 1974.[6]

PRMSA has an ongoing contactual relationship with defendant Puerto Rico Marine Management, Inc. ("PRMMI"), a Delaware corporation that provides operational direction for PRMSA's vessels and is responsible for manning, husbanding, docking, loading and unloading, and booking and soliciting cargo. PRMMI is paid a management fee for these services. PRMMI was organized in 1974 as a wholly owned subsidiary of McLean. On January 15, 1976, McLean entered into a stock purchase

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[5]Motion of Defendant Sun Shipbuilding & Dry Dock Co. to Dismiss Complaint, Exh. B.

[6]*Id.*, Exh. C, Letter of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice.

agreement with defendant TKM Corporation (TKM) under which TKM acquired all the sotck of PRMMI. Defendant Trans Ocean Transportation Executive Management, Inc. ("TOTEM") also has managed cargo vessels on behalf of PRMSA.

The final defendant named in this action is the Puerto Rico Ports Authority ("PRPA"), an agency of the Puerto Rico government with broad responsibility for maritime matters.[7] One of the major functions of the PRPA is to supervise the port of San Juan, the second largest containership port in the world, by assigning vessels to suitable berths, entering into terminal leases with steamship operators, and managing dock facilities. A director of PRPA headed the commission that recommended creation of PRMSA.

On March 13, 1978, plaintiffs instituted the present lawsuit, charging each of the twelve defendants with conspiracy, monopoly, and restraint of trade in violation of sections 1, 2, and 3 of the Sherman Antitrust Act, 15 U.S.C. § 1-3. Specifically, plaintiffs allege that defendants secretly discussed and determined that maritime transportation between Puerto Rico and the mainland should be operated as a monopoly and devised a plan for achieving this goal, which included formation of PRMSA.[8]

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[7]PRPA was created by an act of the Puerto Rico Legislature on May 7, 1942. P.R. Laws Ann. tit. 23, §§331 *et seq.* (1955). Its purpose, as set out in its enabling statute, is ". . . to develop and improve, own, operate, and manage any and all types of transportation facilities and air and maritime services in, to, and from the Commonwealth of Puerto Rico . . . ." *Id.* §336.

[8]*See* More Definite Statement of Paragraph 22 of Plaintiffs' Complaint.

Presently before the Court are motions to dismiss for improper venue and lack of personal jurisdiction filed by defendants, Reynolds, McLean, GPRL, PRMSA, PRPA, TTT, PRMMI, TKM, AUT, and TOTEM. All defendants with exception of Reynolds, McLean, and GPRL have joined in a motion to dismiss, or in the alternative for summary judgment[9] originally filed by PRMSA, PRPA, and TTT (the "Puerto Rico defendants"). The governmental entities seek dismissal on the ground that their actions were immune from liability for antitrust violations under the *Parker* doctrine. The private defendants have moved to dismiss on the ground that their actions were compelled by the Commonwealth of Puerto Rico and therefore also exempt from liability under *Parker*.

VENUE

Although this complaint alleges that the defendants have engaged in a "combination and conspiracy" in violation of the Sherman Act, plaintiffs must establish venue as to each defendant separately. 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3818, at 116 (1969); *see Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 262, (C.D. Pa. 1968). In the present case, plaintiffs attempt to establish venue in the District of Columbia on the alternative grounds that defendants transacted business in this district and that the cause of action arose in this district.

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[9] Because the motions to dismiss are supported by affidavits and other exhibits, the Court will treat them as motions for summary judgment under Fed. R. Civ. P. 56.

Venue over corporate defendants in antitrust actions may be established under the special antitrust venue provisions contained in sections 4 and 12 of the Clayton Act[10] or under the general federal venue provisions.[11] Each of the moving defendants claims that none of the bases for venue contained in these statutes are satisfied in the present case.

Section 4 provides for venue in any district in which the defendant resides, is found, or has an agent. A corporation resides in a district only if it is incorporated or licensed to do business in that state, or has its principal place of business there. 14 Von Kalinowski, *Antitrust Laws and Trade Reg.* § 104.04[4] (1978). The affadavits submitted by the moving defendants in support of their motions to dismiss establish that none of these defendants are incorporated or licensed to do business in the District of Columbia, nor do they directly conduct business or have their principal place of business here.

Section 12 permits venue in any district in which a corporation is an inhabitant, may be found, or transacts business. A corporation is said to be an inhabitant of the state of its incorporation. *Aro Mfg. Co. v. Automobile Body Research Corp.*, 352 F.2d 400, 404 (1st Cir. 1965), *cert denied*, 383 U.S. 947 (1966). A corporation is found where it has "presence and continuous local activities within the district." *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F. Supp. 812, 815 (E.D. Pa. 1972). The moving defendants do not satisfy either of these requirements.

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[10] 15 U.S.C. §§ 15, 22 (1976).

[11] 28 U.S.C. § 1391 (1976).

Section 12 also permits a corporation to be sued in any district in which it "tranacts business." This standard was enacted to enlarge the jurisdiction of the federal courts with respect to venue by substituting "practical business considerations for the previous hair-splitting legal technicalities encrusted on the 'found - 'present' - carrying-on-business' sequence . . . " *United States v. Scophony Corp.*, 333 U.S. 795, 808 (1948). "Transacting business" for the purpose of section 12 has a meaning independent of definitions which courts have given the same phrase in construing other statutes. The test is whether the corporation is doing business in the district of any substantial character, even if its business is entirely interstate in character and is transacted by agents who do not reside within the district. *Id.* at 807; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 372-73 (1927).

Whether a defendant had transacted business is largely a factual question to be determined in each case. In making this determination, courts look for tangible manifestations of doing business.[12] Such manifestations are absent here. None of the moving parties has officers, employees, or agents within the district.[13] None has

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[12] *E.g., Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904, 909-11 (8th Cir.), *cert. denied*, 364 U.S. 911 (1960) (being subject to state regulation, licensing, or taxes constitutes doing business); *Frey & Son v. Cudahy Packing Co.*, 228 F. 209, 212-13 (D. Md. 1915) (maintaining tangible property within the state, such as real estate, inventory, bank accounts, or corporate records constitutes doing business); *Magnetic Eng'r & Mfg. Co. v. Dings Magnetic Separator Co.*, 86 F. Supp. 13, 16 (S.D.N.Y. 1949), *modified*, 178 F.2d 866 (2d Cir. 1950) (employing persons within the district constitutes doing business).

[13] Plaintiffs argue that various defendants retained economic and marine consultants, attorneys, and law firms in Washington,

[footnote continued]

offices or owns property here, nor do they maintain corporate records, telephones, telephone listings, or bank accounts. Plaintiffs' complaint does not suggest any other activity of a similar nature that might bring defendants within the transacting business standard.

Some courts have held that a corporation may be found to be transacting business for venue purposes in the district in which coconspirators were found and where the conspiracy had its impact.[14] In *Giusti v. Pyrotechnic Industries, Inc.*,[15] the United States Court of Appeals for the Ninth Circuit held that because all conspirators are agents for each other, the presence of one defendant in a district can subject his coconspirators to suit in that district as their agent. This theory, however, has been rejected by other courts[16] and this Court

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who assisted in the creation of PRMSA. The Court concludes that these independent contractors were not employees or agents for venue purposes and contracting for legal and economic consultation services does not constitute "transacting business" in a jurisdiction. *Control Data Corp. v. Carolina Power & Light Co.*, 274 F. Supp. 336 (S.D.N.Y. 1967) (North Carolina corporation's engaging engineering and technical consultants in New York, negotiating with investment houses, and retaining legal counsel did not constitute "doing business").

[14] *E.g., Ross-Bart Port Theatre v. Eagle Lion Films, Inc.*, 140 F. Supp. 401, 402 (E.D. Va. 1954); *DeGolia v. Twentiety Century-Fox Film Corp.*, 140 F. Supp. 316, 318 (N.D. Cal. 1953); *Don George Inc. v. Paramount Pictures, Inc.*, 111 F. Supp. 458, 462 (W.D. La. 1951), *mod. on other grounds*, 145 F. Supp. 523 (W.D. La. 1956).

[15] 156 F.2d 351, 354 (9th Cir.), *cert. denied*, 356 U.S. 936 (1958).

[16] *E.g., Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); *Redmond v. Atlantic Coast Football League*, 359 F. Supp. 666, 672 (S.D. Ind.), *aff'd mem.*, 478 F.2d 1405 (7th Cir. 1973);

[footnote continued]

concludes that its application here would be contrary to the principle that venue must be established for each defendant separately. *See* 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3818.

With respect to defendants Reynolds, McLean, and GPRL, plaintiffs do not contend that these entities directly transact business in this district but instead argue that venue is properly laid against them here because of their relationship with defendant Sea-Land. There is no dispute that venue exists in the District of Columbia for Sea-Land because it is licensed to do business here. Sea-Land and GPRL are wholly owned subsidiaries of McLean, a holding company, which in turn is wholly owned by Reynolds. Plaintiffs allege that the management and business operation of these four defendants are so commingled and integrated that venue laid against Sea-Land lies against the moving defendants. In support of this argument, plaintiffs have attempted to detatil the various degrees of participation by Reynolds, Sea-Land, McLean, and GPRL in the sale of Sea-Land's assets to PRMSA.[17]

When a parent and its subsidiary are joined as defendants in an antitrust action, venue over the parent may be based on the local activities of its subsidiary "if the relationship between that parent and the subsidiary is such that the subsidiary may be considered the agent

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Occidental Petroleum Corp. v. Buttes Gas & Oil Corp., 331 F. Supp. 92, 96-97 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). *See also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

[17] *See* Plaintiffs' Opposition to Motion to Dismiss Complaint filed by R.J. Reynolds Indus., Inc., McLean Indus., Inc., and Gulf Puerto Rico Lines, Inc., at 4-7 and Exh. A-B.

or the alter ego of the parent." *Audio Warehouse Sales, Inc. v. U.S. Pioneer Electronics Corp.*, 1975-1 Trade Cas. ¶ 60,213 (D.D.C. 1975). Generally when the subsidiary maintains a separate legal identity, its presence in the district will not be sufficient to bring the foreign parent corporation within the ambit of section 12. *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1259 (E.D. Ky. 1972).

It is also generally accepted that mere ownership of stock in a subsidiary corporation transacting business in a district does not establish venue against the parent corporation. *See, e.g., O.S.C. Corp. v. Tobshiba America, Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974). In order for the parent corporation to be amenable to suit, it must exercise a control relationship over its subsidiary. *See Tiger Trash v. Browning-Ferris Indus., Inc.*, 560 F.2d 818, 822 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). This concept of control is a method of determining whether the ownership of the subsidiary is a mere investment or is an alternative means of transacting business by the parent corporation.[18]

Plaintiffs here have alleged that Reynolds, McLean, Sea-Land and GPRL represent an integrated and interlocking management scheme so that the three moving defendants were transacting business in this jurisdiction through their relationship with Sea-Land. Applying the principles discussed above to the facts of this case makes it clear that the transacting business requirement is not

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[18] *See Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 841 (S.D. Fla. 1975) (100% ownership by parent, exchange of officers and employees, and common directors supported finding that parent controlled subsidiary for venue purposes).

satisfied. The essential element required before a court can find that one corporate entity was transacting business through an alter ego is control over the conduct that allegedly violated the antitrust laws. *Call Carl, Inc. v. B.P. Oil Corp.*, 391 F. Supp. 367, 371 (D. Md. 1975); *see Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 131 (S.D.N.Y. 1975). With respect to GPRL, which along with Sea-Land is a cosubsidiary of McLean, there has been not even a suggestion of how GPRL could exercise the required control relationship.

Even though Sea-Land is a wholly owned subsidiary of McLean, which is owned by Reynolds, the separate identities of the subsidiaries are maintained and the evidence indicates that each carries on its activities without having daily business affairs controlled by the parent. *See In re Chicken Antitrust Litigation*, 407 F. Supp. 1285 (N.D. Ga. 1975). There has been no evidence that the parent exerted the required degree of control over its subsidiary or was involved directly in its operations and policy decisions. *See Dobbins v. Kawasaki Motors Corp.*, 1974-1 Trade Cas. ¶ 75,000 (D. Ore. 1974). Although there is some interlocking management between the three entities,[19] the Court concludes that the control relationship is absent and venue over GPRL, McLean, and Reynolds cannot be predicated on the existence of venue in this jurisdiction over Sea-Land.

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[19] For example, Malcolm McLean, the president of McLean, also serves as Chairman of the Board of Sea-Land and as a member of the Board of Directors of Sea-Land. Stock ownership and interlocking directorates, however, have been found insufficient to establish venue under the transacting business standard when control over daily business activities is lacking. *See Hayashi v. Sunshine Garden Prod., Inc.*, 285 F. Supp. 632 (D. Wash. 1967).

The final method of establishing venue in antitrust actions is under section 1391 of the general federal venue statutes. Section 1391(b) is an important section for private antitrust plaintiffs because it allows them to establish venue in the judicial district in which the claim arose, a choice of venue not afforded under the venue provisions of the Clayton Act.[20] In determining whether a particualr jurisdiction is actually the district in which the claim arose, it is necessary to consider whether the parties had a significant relationship to the district. This depends upon the occurence in the district of events such as "sales, injury, conspiratorial meetings, or overt acts pursuant to such meetings." *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053, 1056 (E.D. Pa. 1969).

In making this determination, a "weight of contacts" test should be used. 14 Von Kalinowski, *Antitrust Laws & Trade Reg.* § 104.04[2] (1978). This requirement can be satisfied, for example, if significant sales causing substantial injury to plaintiffs occurred in the district or if some other overt act took place that was a "significant and substantial" element of the offense. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 261 (E.D. Pa. 1968).

Plaintiffs attempt to satisfy the weight of contacts test by alleging that a number of conspiratorial meetings took place in the District of Columbia and that certain legal

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[20] Although there has been some judicial uncertainty whether the general federal venue statute expands special venue provisions, it is now generally recognized that these provisions are available absent contrary statutory restrictions. *See Pure Oil Co. v. Juarez*, 384 U.S. 202, 207 (1966) (Jones Act venue provision expanded by later general venue statute 28 U.S.C. § 1391 so that corporation may also be sued in district where it does business).

documents relating to the sale of assets to PRMSA were drafted here.[21] Some courts have held that conspiratorial meetings may be sufficient to establish venue under section 1391 as to each defendant who was present there. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 429 F. Supp. 139 (N.D. Ill. 1977). Before such a rule can be applied, however, it is necessary to find that such meetings took place, that they involved a violation or an attempted violation of the antitrust laws, and that each of the moving defendants participated in them. *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F. Supp. 739, 743 (N.D. Ill. 1970).

Such findings cannot be made here. Although some defendants met with counsel in this jurisdiction and had other contacts here, the Court concludes that such meetings, even if viewed in the light most favorable to plaintiffs, did not represent a violation or attempted violation of the antitrust laws. To the extent that such meetings sought to achieve the passage of Act 62, they were exempted from antitrust liability under the *Noerr-Pennington* doctrine.[22] To the extent they were related to the sale of assets to PRMSA, the state action exemption discussed below would preclude liability.

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[21] *See* affidavit of John R. Immer, Exh. C to Plaintiffs' Opposition to Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment. Plaintiffs also describe meeting and other contacts between various defendants and the Federal Maritime Commission but such governmental contacts by federally regulated industries do not constitute "transacting business" in the District of Columbia. *Fandel v. Arabian American Oil Co.*, 345 F.2d 87 (D.C. Cir. 1965).

[22] *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *see* pages 30-31 *infra*.

As a final argument, plaintiffs urge that their claim arose within the meaning of section 1391 because they suffered financial injury in this jurisdiction. At least one court has rejected the weight of the contacts test and held that venue can be established under section 1391 in the judicial district in which the injured plaintiff operated. *Iranian Shipping Lines, S.A. v. Moraties,* 377 F. Supp. 644 (S.D.N.Y. 1974); *Albert Levine Assoc. v. Bertoni & Cotti, S.P.A.,* 314 F. Supp. 169 (S.D.N.Y. 1970).

To hold that a cause of action necessarily arose in the district in which the plaintiff was injured is a "simplistic rationale to which antitrust actions are not susceptible." *Redmond v. Atlantic Coast Football League,* 359 F. Supp. 666, 669 (S.D. Ind.), *aff'd mem.,* 478 F.2d 1405 (7th Cir. 1973). The Court agrees with this conclusion and holds that plaintiff's allegations of injury in this district will not support a finding of venue here. To hold otherwise would be tantamount to extending venue under section 1391 to any district in which the plaintiff resides, a result clearly not contemplated by the rules. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,* 291 F. Supp. 252, 260 (E.D. Pa. 1968).

After careful review of the facts of this case, the Court concludes that, despite their vigorous efforts, plaintiffs have failed to establish that venue exists in this jurisdiction over defendants Reynolds, McLean, and GPRL. Although venue is also probably deficient with respect to the other moving defendants, in the interests of judicial economy and achieving a resolution on the merits, the Court will not address these motions but will instead consider the alternative motions for sum-

mary judgment based on the state action exemption to the antitrust laws.

STATE ACTION EXEMPTION

The governmental and remaining private defendants have moved for summary judgment[23] on the ground that the conduct at issue in this lawsuit is immune from liability under the state action exemption to the antitrust laws. Because the immunity of private parties derives from a determination that the conduct of the state entities is so immunized, it is first necessary to consider the applicability of the state action exemption to Puerto Rico defendants.

The principle that state action is beyond the scope of federal antitrust laws stems from the decision of the Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943). In *Parker* the Court rejected a producer's claim that a state agricultural marketing program established pursuant to statute violated the Sherman Act. Noting that the state had adopted the program to restrict competition and maintain prices, the Court held that Congress intended the Sherman Act to restrain private anti-competitive conduct and not actions taken by a state or its agencies in furtherance of a legislative mandate. There is no dispute that Puerto Rico is a state for purposes of applying the *Parker* doctrine. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 351 F. Supp. 1153, 1229 (D. Hawaii 1972), *mod. on other grounds,* 518 F.2d 913 (9th Cir. 1975).

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[23]Defendant Sea-Land has moved for partial summary judgment on any issues of antitrust liability arising out of its sale of certain operational assets to PRMSA.

Defendants argue that the actions of a state instrumentality mandated by clear legislative authority are immune from antitrust liability under *Parker.*[24] They note that in this case the Puerto Rico legislature specifically mandated its instrumentality, PRMSA, to take over and operate the shipping trade between the East Coast and Gulf ports of the United States and Puerto Rico. PRMSA carried out the mandate by acquiring and operating ships in this trade, and defendants argue that as a result, the PRMSA acquisition and operation of the steamships are immune from antitrust liability.

A. State Instrumentalities.

After a long period of silence, the Supreme Court in recent years has given renewed attention to the scope of the *Parker* doctrine[25] and its decisions have been the sub-

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[24]The terms "state action exemption" and "antitrust immunity" are frequently used to refer to the *Parker* doctrine, but these terms are less than accurate in view of the Supreme Court's statement that "[t]he Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action." 317 U.S. at 351; *see Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 n.5 (7th Cir. 1977) (Sherman Act was not intended to apply to state-mandated activities but courts nonetheless utilize single-word shorthand references of "exemption" or "immunity").

[25]*See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Prior to these decisions there had been a 32-year period in which the Supreme Court consistently declined to review cases involving the *Parker* doctrine. *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

ject of extensive legal commentary.[26] The most recent case involving the doctrine is *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), in which the Court held municipalities could not invoke the *Parker* doctrine in a suit for antitrust violations allegedly committed by them in connection with ownership of public utilities.

In refusing to find antitrust immunity, a plurality of the Court held that municipalities, like other state instrumentalities, are not exempt from application of the antitrust laws simply by virtue of their status as governmental entities. *Id.* at 413. The plurality stated: "We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*[27]

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[26] *E.g.*, Handler, *The Current Attach on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1 (1976); Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Doctrine under the Antitrust Laws*, 74 Nw. U. L. Rev. 31 (1979); Verkuil, *State Action Doctrine, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 Colum. L. Rev. 328 (1975); Note, *Anti-Trust Law and Municipal Corporations*, 65 Geo. L.J. 1547 (1977).

[27] Chief Justice Burger, who provided the fifth vote for affirmance of the Fifth Circuit's decision in *City of Lafayette*, did not join in this portion of the opinion but his concurrence indicates that he regarded the plurality's approach as the minimum to be required of a state instrumentality, which he felt should demonstrate that it is acting in a proprietary capacity before it is allowed the protection of *Parker*. 435 U.S. at 418 (Burger, C.J., concurring); *see Star Lines Ltd. v. Puerto Rico Maritime Shipping Authority*, 451 F. Supp. 157, 165 (S.D.N.Y. 1978).

City of Lafayette thus establishes a two-fold inquiry that must guide the Court in applying the *Parker* doctrine. The first consideration is whether the state, acting as sovereign, has required its agency or instrumentality to engage in the particular form of anticompetitive conduct. This is not to suggest that the *Parker* doctrine permits each state legislature to determine the extent to which a particular government agency under its control should be exempt from the antitrust laws. As the Court in *Parker* indicated, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. The decision did recognize, however, the overriding policy of federalism, namely, that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

In order for *Parker* to apply, it is not necessary for a state legislature to direct its instrumentality to perform a specific anticompetitive act. The threshold requirement for *Parker* immunity is satisfied if the legislature directs its instrumentality to engage in a particular type of activity. As the plurality opinion in *City of Lafayette* stated:

> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a govern-

> mental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'

433 U.S. at 415.

In this case, there is no dispute that PRPA and PRMSA are agencies of the Commonwealth of Puerto Rico.[28] The Statement of Motives of Act 62, which established PRMSA, contains a clear expression of legislative intent:

> The Legislature of Puerto Rico intends that this instrumentality acquires and operates shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on the public instrumentality hereby established.

In addition, section 25 of the Act repeats the intention of the legislature that PRMSA, in carrying out its mandate to provide efficient, reliable, and economic maritime services, not be subject to antitrust laws:

> *Conflicting Laws Inapplicable.* Insofar as the provisions of this act are in conflict with the provisions of any other law, or parts thereof, the provisions of this act shall prevail. Specifically, and without otherwise limiting the generality of the foregoing, it is intended by this act that the Antitrust Laws shall not be applicable to any action of the Authority taken pursuant to the provisions hereof.

A recent case construed this statute under the criteria set out by the Supreme Court in *City of Lafayette*. In

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[28] *See* P.R. Laws Ann., tit. 23, §333(b) (1955); Act, *supra* note 2, §4.

Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157 (S.D.N.Y. 1978), a Liberian corporation sued PRMSA for alleged antitrust violations arising from the short-term lease of a PRMSA vessel not needed in the Puerto Rico trade to plaintiff's competitor in the Persian Gulf. In denying PRMSA's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the district court held that the transaction in question – leasing a ship to others to operate in foreign trade unrelated to Puerto Rico – was not performed pursuant to any governmental policy to displace competitive market forces in the area. *Id.* at 166. It found that "the connection between the legislative grant of power to PRMSA and its use of that power under the facts of this case is simply 'too tenuous to permit the conclusion that the entity's intended scope of activity included such conduct.' " *Id.* at 167 (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976), *aff'd* 433 U.S. 389 (1978)).

The Court noted, however, that if the challenged conduct were such that it could reasonably have been contemplated by the legislature as necessary to ensure complete and reliable carrier service or proper maintenance of port facilities, it could withstand attack under the antitrust laws. It stated:

> Certainly if the conduct being challenged here were that PRMSA had reduced competition in the Puerto Rican-East Coast trade by acquiring a majority of those vessels suitable for engaging in that trade, or that PRMSA had contracted with a single private company to control Puerto Rico's port facilities, PRMSA's claim to antitrust immunity would be on much stronger ground.

Id. (footnotes omitted).

Plaintiffs do not deny that the Puerto Rico legislature not only intended, but in fact authorized and mandated, state control of all shipping lines operating between Puerto Rico and the Eastern and Gulf ports of the United States. Neither do they dispute that the legislature intended to immunize the acquisition and operation of the shipping lines from federal antitrust laws.[29] Instead they urge that the *Parker* doctrine is inapplicable to this situatin because the immunized state conduct consisted of acts outside the territory over which the state had legislative jurisdiction.

In support of this argument, plaintiffs rely on one of the few cases to raise this isue, *Ladue Local Lines, Inc. v. Bi-State Development Agency,* 433 F.2d 131 (8th Cir. 1970). *Ladue* involved a political entity created by the legislatures of Illinois and Missouri to acquire and operate a public transit system in eastern Missouri and western Illinois. Plaintiff, a private company that engaged in bus transportation in the same area, brought an antitrust action alleging that defendant's monopolistic control of the public transportation market had destroyed its business by precluding it from bidding on and servicing schools and school systems. *Id.* at 132.

Affirming the district court's dismissal of the action, the court of appeals held that when a political body created by the legislatures of Illinois and Missouri was acting under Congressionally-approved authorization[30]

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[29] *See* Plaintiffs' Opposition to the Motion to Dismiss the Complaint by the Puerto Rican Defendants, at 2.

[30] Bi-State was organized pursuant to a compact entered into by the states of Illinois and Missouri. The consent of Congress to such compacts is required by Article I, Section 10, Clause 3 of the

[footnote continued]

to operate bus transportation facilities and that authorization was granted pursuant to a legislative policy that public interest would best be served by a unified public transportation sytem, the activity was not subject to the antitrust laws even though a monopoly was created. *Id.* at 137. Plaintiffs urge that in the absence of such interstate agreement, any unilateral attempt by one sovereign to displace competition in another jurisdiction will not survive scrutiny under federal antitrust laws and seek to apply this agreement to the situation here.

To the extent that plaintiff's argument suggests that a state's immunity under the antitrust laws is limited to its own territory, it ignores a central truth of the *Parker* doctrine. A necessary element of any violation of the federal antitrust laws is an effect on interstate commerce.[31] As commentators have noted, in a unitary economic system such as ours, jurisdiction under the Sherman Act should be presumed on the ground that every restraint "has the inherent tendency to affect interstate resource allocation and the interstate movement of goods and services in our national economy."[32]

Constitution, which states in part: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . . ." The Bi-State compact was approved by the Act of August 31, 1950, Pub. L. No. 81-743, 64 Stat. 568.

[31] Sections 1 and 2 of the Sherman Act are applicable only to "trade or commerce among the several States." 15 U.S.C. §§1,2. Section 3 of the Sherman Act applies to contracts, combinations, or conspiracies "in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia and any State or States or foreign nations . . . ." 15 U.S.C. §3.

[32] P. Areeda and D. Turner, 1 *Antitrust Law* ¶232a, at 229-30 (1978).

The exemption created in *Parker v. Brown* for state action must be coextensive with the scope of the Sherman Act, and thus is applicable to the interstate effects of a particular form of state action. *Parker v. Brown* itself supports this analysis, for that case involved action by the State of California to raise and stabilize the price of raising, ninety-five percent of which were sold outside the state. 317 U.S. at 345. Plaintiffs' "extraterritoriality" argument is in direct conflict with the fundamental message of *Parker* that the entire Sherman Act, including its extraterritorial coverage, was never intended to restrain state action undertaken pursuant to a proper legislative mandate to displace competition.

In summary, the most recent judicial interpretations of the state action doctrine require that the anticompetitive conduct engaged in by a state instrumentality be undertaken pursuant to a governmental policy to displace competition with regulation or monopoly public service. Here the Puerto Rico legislature, in an attempt to ensure adequate carrier and passenger service between Puerto Rico and the mainland, specifically mandated its instrumentality PRMSA to take over and operate the shipping trade. PRMSA carried out that mandate by acquiring and operating the steamships in such trade. This conduct, which is the subject of plaintiffs' complaint, is immune from antitrust liability under the state action doctrine.

PRPA acted under a similar legislative mandate to operate the transport facilities of Puerto Rico and to establish rules and regulations for their use. This conduct was also undertaken in the exercise of a valid governmental function and is similarly immune from antitrust liability. *See E.W. Wiggins Airways, Inc. v. Massachusetts*

Port Authority, 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

B. Private Defendants.

The issue of the antitrust immunity of private parties did not arise in *Parker* because that case involved an equity suit against state officials. 317 U.S. at 344. Although there has been some judicial uncertainty regarding the reach of the *Parker* doctrine, it seems clear that a majority of the present Supreme Court believes that *Parker* is equally applicable to suits against private parties whose actions are compelled or regulated by the state.[33] The correctness of this interpretation becomes apparent by considering the facts of the original *Parker* case. In that instance, if the federal government or a private litigant could have enforced the antitrust laws against the raisin producers, effectuation of state policy would have been thwarted just as if the state action immunity were never granted. P. Areeda & D. Turner, 1 *Antitrust Law*, ¶ 212b, at 69 (1978); *see Trans-World Assoc. v. Denver*, 1974-2 Trade Cas. ¶ 75,293 (D. Colo. 1975).

In the present action the nongovernmental defendants maintain that their conduct is immune from antitrust liability because of the state action immunity applicable to PRMSA. The Court agrees with this interpretation, for it would be anomalous to hold that PRMSA, the state-sanctioned mechanism for acquiring control of the island's ocean transportation, was immune as the buyer

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[33] *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 603 (1976) (Burger, C.J., concurring in part); *id.* at 605, 613 n.5 (Blackmun, J., concurring in judgment); *id.* at 614-15 (Stewart, Powell and Rehnquist, JJ., dissenting).

of the assets of certain carriers and simultaneously to withhold such immunity from the selling carriers. Similarly defendants PRMMI, TKM, and TOTEM, whose involvement in this lawsuit arises from their operation and management of cargo vessels on behalf of PRMSA, cannot be held liable under the antitrust laws if PRMSA's conduct in operating the ships was immunized.

A similar conclusion regarding the immunity of private parties engaged in business enterprises with state instrumentalities has been reached by other courts. In *Trans-World Assoc., Inc. v. Denver, supra,* plaintiff sought to operate a rent-a-car concession at the city airport, but its application was denied on the ground that it was city policy to permit only five concessionaires to operate at any one time. The city and the existing concessionaires were named as defendants in an action alleging conspiracy and attempt to monopolize the airport car rental business. The Court dismissed the causes of action involving the city of Denver on the basis of the state action exemption and further held that "since the city is privileged to enter into negotiations and agreements, which might otherwise violate the Sherman Act, those with whom the cities contract are similarly entitled to anti-trust immunity." *Id.* at 97,900.[34]

Plaintiffs also appear to suggest that the actions of the private defendants in lobbying and advising the Puerto Rico government and legislature regarding the desirability

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[34] *See also Padgett v. Louisville & Jefferson City Air Bd.*, 492 F.2d 1258 (6th Cir. 1974) (per curiam); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Metro Cable Co. v. CATV of Rockford*, 375 F. Supp. 350 (N.D. Ill. 1974).

and organization of a state shipping authority precludes any claim that their actions were compelled and that, in the absence of such compulsion, defendants cannot claim immunity under *Parker.* Two recent Supreme Court cases have raised the possibility that a private party's right to antitrust immunity may depend upon whether the challenged actions were compelled by a state. In *Goldfarb v. Virginia State Bar,* the Court refused to extend antitrust immunity to Bar Association minimum fee schedules and offered as one of its reasons: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." 421 U.S. 773, 792 (1975). Similar sentiments were expressed in *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). A program for providing light bulbs was originally proposed by the utility but was made mandatory by the state utility commission. Concluding that the option to have the program was the utility's and was not imposed by the commission, the Court determined that the defendant "exercised sufficient freedom of choice" for the Court to find that compulsion was absent. *Id.* at 593.

The role that compulsion should play in determining antitrust immunity is left unclear by these cases, which involve different forms of state action than the ones presented here. In *Goldfarb* and *Cantor* the Court recognized that neither adequate supervision nor state intent to displace antitrust enforcement could be demonstrated. It has been suggested that the presence or absence of compulsion is important because it provides evidence of state intent.[35] Compulsion establishes that the state

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[35] P. Areeda & D. Turner, *supra* note 32, ¶ 215b, at 96.

intends to displace the antitrust laws for otherwise the compulsion would be without purpose and effect. Similarly lack of compulsion suggests that intent to provide immunity does not exist. In this case there is clear independent evidence in Act 62 itself that antitrust immunity is intended. It is therefore unnecessary to look to the presence or absence of compulsion as evidence of intent.

Earlier Supreme Court decisions also establish that a court cannot require the absence of initiative or lobbying by a defendant before granting him immunity. The *Parker* case itself is proof to the contrary, for there, raisin producers initiated the procedure leading to state restrictions. Their representatives formulated the plan reviewed and approved by the California legislature and the plan took effect only upon a favorable referendum among raisin producers.

Plaintiffs' argument that compulsion is required is also refuted by the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), in which the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws. This decision is based on two principles. The first is that a contrary holding would impede the communication between citizens and their lawmakers, without which a representative democracy could not function. The second element is the threat to the constitutionally protected right of petition that would result from a con-

trary construction. *Id.* at 137-38.[36] Thus the actions of some private defendants in lobbying the Puerto Rico government prior to the formation of PRMSA does not preclude their claim to exemption from antitrust liability under the state action exemption.

PRMSA and PRPA have established that they are governmental agencies acting pursuant to a legislative mandate to displace competition with a public monopoly. As such, their actions in acquiring vessels and operating them in the United States-Puerto Rico trade, which form the basis of this complaint, are exempt from antitrust liability under the *Parker* doctrine. The conduct of the private defendants in selling vessels to PRMSA or in operating them on behalf of PRMSA is similarly immunized. Accordingly, the moving parties' motions for summary judgment are granted and this action is dismissed.

/s/ Oliver Gasch
Judge

Date: April 19, 1979

[36] *See also United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965). *Pennington* held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying the Secretary of Labor for legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying the TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to *Pennington* have emphasized that any contrary construction would pose a serious threat to first amendment freedoms. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (Stewart, J., concurring in judgment).

APPENDIX B

Per Curiam Decision of the United States Court of Appeals, July 3, 1980.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Apr 23, 1979]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Senior Circuit Judge; WILKEY and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for any opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). We are satisfied that the district court correctly identified the issues raised by the plaintiff as involving only violations of the Sherman Act. On those issues we are in agreement with the district court's disposition. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the district court's order filed April 23, 1979 is therefore affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

APPENDIX C

Decision of Panel and Court Rejecting Petitioners' Application for Rehearing, or in the Alternative Rehearing *En Banc*, August 29, 1980

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Aug. 29, 1980]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Wald, Circuit Judges

ORDER

Upon consideration of appellants' (Caribe Trailer Systems, Inc, et al.) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER

By: /s/ Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Aug. 29, 1980]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants (Caribe Trailer Systems, Inc., et al) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

Memorandum of February 14, 1974, on Meetings of February 11 and 12, 1974, Prepared by Mr. Kesterman for Distribution to Puerto Rican Representatives Teodoro Moscoso and Others. Court of Appeals Joint Appendix pp. 874-879

February 14, 1974

TO: Distribution
FROM: Kesterman
SUBJECT: RECENT MEETINGS WITH SEALAND, SEATRAIN & TTT, February 11th and 12th – ACTION ASSIGNMENTS

STRATEGY SESSION

At 8 A.M., Monday, February 11th, a strategy session was held to acquaint all parties with the latest happenings and information relevant to the meetings scheduled for the next 2 days. Present were: Ted Moscoso, Juan Albors, Francisco De Jesus Schuck, Judge Ramirez, Moe Moses, Mario Escudero, Fred Smith and Frank Kesterman.

SEALAND MEETING – 9:30 A.M., February 11, 1974.

The group met with Malcolm McLean and Allen Stevens of SEALAND. McLean stated that SEALAND would prepare a plan for Commonwealth takeover of the entire trade, using SEALAND Management as the general agent for the Commonwealth. McLean thought the plan could be accomplished for 20-25 million of which 8 million would be working capital and the remainder used for purchase of TTT assets. The plan to be prepared by SEALAND is to include:

a) rationalization of the Trade (consolidation of all carriers, services and facilities)
b) Financial Plan

c) Management Plan
d) Regulatory and Legal Plan
e) New Ship Construction Program

The plan is to be completed and circulated by March 6th for discussion at a meeting schedules for 10 A.M., March 11, 1974. This meeting will be held in McLean's office at 660 Madison Avenue, New York, New York.

Allen Stevens of McLean's corporate planning staff is to prepare the plan, meeting with Fred Smith as required to factor in other known considerations. Fred Smith, Frank Kesterman and Mario Escudero are then to review the plan for adequacy in all areas before the plan is sent to others in the negotiating group.

SEALAND EVENING MEETING – February 11th

At the evening meeting, February 11th, between McLean, Stevens, Smith and Kesterman, the framework of SEALAND's plan was revealed to include:

a) Removing all SEALAND ships from the East Coast trade and placing in service, three of SEALAND's larger C-4J containerships (610-35' containers).
b) Chartering three SEATRAIN ships (481-40' containers).
c) Using 2 of TTT's Ro-Ro ships and placing the third ship some place else in the SEALAND fleet.
d) Elimination of TTT's terminals in New York and Baltimore and consolidation of SEALAND's and TTT's terminals in San Juan.
e) Elimination of all SEATRAIN terminals.
f) Elimination of SEATRAIN and TTT managements.
g) A management contract with SEALAND service, whereby, SEALAND shares 50-50 in savings

below present total cost of service in the trade plus non-controllable future escalations associated with inflation and trade growth.

SEATRAIN MEETING – 3 P.M. February 11th

Representing SEATRAIN were Howard Pack, Chairman of the Board of Jim Connally, Vice President of Finance.

SEATRAIN was informed that the Commonwealth was now negotiating with SEALAND and because of that fact, a decision could not be made at this time with respect to the SEATRAIN proposals.

Pack stressed that SEATRAIN was under severe pressure from their bankers to liquidate or take other actions to cut their losses. Further, they presently are in the process of going to their banks for more working capital. Pack asked if we could start trading on the charters now in expectation that if we were in a position to make them an offer in 3-4 weeks, then at least they would know the terms of the offer. This was agreed to by the Commonwealth with the condition that a commitment to negotiate was not a commitment to make a firm offer. Kesterman has the responsibility for developing charter rates and equipment lease rates to form the baseline for negotiation. An independent marine surveyor is to inspect the vessels and equipment after negotiations appear heading in a positive direction. The Commonwealth's offer to SEATRAIN will be presented to SEATRAIN around February 25th. SEATRAIN will present their position with respect to the offer at a meeting to be held at the AFDA Club, Febuary 28th at 10 A.M.

TTT MEETING – February 12th

Attending for TTT were Peter Holzer and Paul Atkinson.

TTT agreed to the purchase price of $17 million subject to resolution of:

a) contingent liabilities and assets
b) a management contract for TTT
c) legal questions set forth in the Pepper, Hamilton & Scheetz letter dated February 6, 1974 attached.

Assignments were made to seek a resolution of the outstanding questions in the Pepper, Hamilton & Scheetz letter.

I. *Anti-Trust Proceedings* – Francisco de Jesus Schuck with the assistance of counsel will seek a no action ruling from the Justice Department of the intent to purchase the assets of TTT.

II. *Tax Position of GECC and Sun Oil Co.*

Matt Zinn and Mario Escudero, representing the Commonwealth and Allen Choate, representing Sun Shipbuilding to resolve the future status of TTT (P.R.) and FORTALEZA time charter with respect to maintaining U.S. source income for GECC, the ultimate owner of GECC.

III. *Proposed Management Contract*

Escudero to determine how to avoid another carrier (TMT) or shipper seeking injunction in a Federal District Court or via the FMC to block a monopoly placed under a management company which was also a carrier in the trade.

With respect to a management incentive formula, TTT did not like the one prepared by Kesterman. However, they did not offer any ideas on what

would be better. TTT was asked to submit an alternate management incentive plan.

IV. *Tax Consequences to TTT Shareholders*

It appears that the capital gains tax rate on the sale of stock (35%) will be considerably lower than the tax rate on income derived from the sale of assets (54-62%). Peter Holzer agreed to take the lead on this question.

V. *Necessity of FMC Approval.*

All attorneys agree that the FMC should not have jurisdiction over the sale of assets. However, the management Company could be considered a non-vessel owning common carrier, subject to the jurisdiction of the FMC. It was suggested that the management people might become employees of the Puerto Rico Maritime Shipping Authority to circumvent FMC jurisdiction. Escudero has the lead on this item.

VI. *Problems Under Long Term Financing Agreements*

Paul Atkinson and Fred Smith will work on the resolution of the problems of substituting of the Commonwealth for Sun Shipbuilding and Sun Oil on charter guarantees, working capital, maintenance and Flow of Funds Agreements.

Note: Maritime Administration has approved the Commonwealth as meeting the U.S. Citizen requirements and as such can own, charter and operate ships documented under the laws of the United States.

BRAZIL TRADE & TTT MANAGEMENT

Additional discussion was held on helping TTT develop a Brazil-Puerto Rico-U.S. Northbound trade as a means to find a way to constructively use TTT's management and Atkinson's shipbuilding capability to the net benefit of the Commonwealth.

It may be advisable to keep a second management organization somehow involved to keep SEALAND from having a monopoly in the long term which the Commonwealth would find overpowering and difficult to disengage from if the relationship proved to be unsatisfactory.

NEW SHIPS

We need to begin developing a fleet "optimization" study to determine new ship requirements and mix of Ro-Ro vs. containerships. Separate meetings will be held with ship designers, shipbuilders and operators to develop basic input data. Kesterman has lead on this project.

DISTRIBUTION:

Moscoso	Francis	Albors	Francisco de Jesus
Ramirez	Moses	Smith	Zinn
Escudero			

APPENDIX E

Replies to Interrogatories, Mr. Kesterman. Court of Appeals Joint Appendix, pp. 657-658.

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 74-44

AGREEMENT BETWEEN PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC./PUERTO RICO MARINE OPERATING COMPANY, INC.

RESPONSE OF FRANCIS R. KESTERMAN TO INTERROGATORIES PROPOUNDED BY CARIBE TRAILER SYSTEMS, INC. ON MAY 28, 1975

1. I have never been an employee of the Economic Development Administration or other agency of the

Development Administration or other agency of the Commonwealth of Puerto Rico. However, commencing April, 1973, I have been a consultant at various times for the Economic Development Administration and the Puerto Rico Maritime Shipping Authority.

2. My work assignments during 1973 and prior to January 23, 1974 were to counsel the Economic Development Administration and other government officials on maritime developments, including shipping, ship building and ports which affect the Commonwealth of Puerto Rico. In addition I prepared evaluations of proposals for the improvement of ocean transportation service between Puerto Rico and the exterior and represented the Economic Development Administration on inter-agency committees.

3. As I stated at page 20 of my deposition in this proceeding, I do not keep a calendar or diary, and it would be impossible to try to reconstruct every one of the literally hundreds of meetings I attended during this period.

4. Please see pages 19, 20, 69 and 70 of my deposition.

5. None.

6. Never.

7. My travel records reflect that I attended meetings in New York in 1973 up to January 23, 1974 as follows:

7/6, 7/11, 7/30, 8/6, 8/9, 8/14-15, 8/23, 8/30, 9/12, 9/19, 9/24, 10/1, 10/9-10, 10/15, 10/23, 11/12, 11/16-17, 11/19, 11/30 and 12/11.

I am a resident of the Washington area and maintain my office in Washington, D.C., and therefore it would be impossible for me to be more specific than to say that I was in Washington, D.C. during most of the period in question.

8. Please see answers to questions 3, 5, and 6 above.

I HEREBY CERTIFY that the above answers are true and correct to the best of my knowledge and belief.

/s/ Francis R. Kesterman
Francis R. Kesterman

Subscribed and duly sworn to before me a Notary Public this 11th day of June, 1975.

/s/ Ann E. Leasuskas
Ann E. Leasuskas
Notary Public

[SEAL]

My Commission Expires: 3/4/80